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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 108

ELLIOT L. RICHARDSON, Secretary of Health, Education, and Welfare, *Petitioner*

v.

PEDRO PERALES

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION OF AMERICAN BAR ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

This appeal arises from the claim of a private individual for social security benefits based upon disability.

The American Bar Association became interested only when the court of appeals stated in its opinion issued on May 1, 1969 that the Administrative Procedure Act did not apply to cross-examination in disability hearings before hearing examiners appointed under Section 11 of the Administrative Procedure Act and employed by the Social Security Administration of the Department of Health, Education and Welfare. (App. 42)

The Association supported enactment of the Administrative Procedure Act. Through its Administrative Law Section it has sought to preserve the improvements in the federal administrative process achieved by that statute. With the approval of the Association's Board of Governors, a brief amicus curiae was filed with the court of appeals, when the Secretary sought rehearing, in an effort to persuade that court to amend its statement regarding the applicability of the Administrative Procedure Act. The court of appeals declined to amend its opinion in this regard.

After the Secretary filed his brief in this court, authorization was sought and obtained on August 7, 1970 from the Association's Board of Governors to file the attached Brief Amicus Curiae with this Court in opposition to the Secretary's effort to persuade this Court that the Administrative Procedure Act does not apply to hearings under the Social Security Act. In view of the time exigencies, no attempt has been made to obtain the assent of the parties to the filing of this motion and the accompanying Brief Amicus Curiae.

WHEREFORE, the American Bar Association respectfully requests permission to file with the court, for its consideration, the attached Brief Amicus Curiae.

Respectfully submitted,

AMERICAN BAR ASSOCIATION

By FRANKLIN M. SCHULTZ
Chairman, Administrative Law Section

JOHN T. MILLER, JR.

Its Attorneys

August, 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 108

ELLIOT L. RICHARDSON, Secretary of Health, Education, and Welfare, *Petitioner*

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION

PRELIMINARY STATEMENT

This appeal arises from a claim for social security benefits under the disability provisions of the Social Security Act, 42 U.S.C.A. Sections 416(i)(1) and 423. The claimant was denied relief after a hearing held on a record before a hearing examiner appointed under the Administrative Procedure Act (APA). The

issue on appeal involves the weight to be given medical reports of physicians who examined the claimant but who were not present at the hearing in which their reports were admitted into evidence.

In affirming a district court decision requiring a new administrative hearing, the court of appeals stated in its original opinion that "the Administrative Procedure Act does not control the method of conducting hearings under the Social Security Act, if in conflict therewith, and the right of cross-examination provided for in the former will not prevail over the procedures established by the Secretary under the latter statute." (App. 42) When rehearing was sought by the Secretary, the American Bar Association filed an amicus brief arguing that the issues before the court could and should be determined under the Administrative Procedure Act. The court of appeals declined to modify its opinion in this regard. (App. 54)

In the brief for petitioner filed in this Court, the Secretary has avoided any reference to the Administrative Procedure Act. The Social Security Act is considered a sufficient source of the Secretary's regulation of the administrative procedures in social security cases. Although the statutory provisions of the Social Security Act relied upon by the Secretary were enacted prior to the time the APA became law, the Secretary asserts that the "only basis on which these statutory provisions could be attacked would be that they operate, in some way, to deny 'due process of law,' contrary to the Fifth Amendment." (Pet. Br. 16)

The American Bar Association takes no position on the merit of respondent's claim, nor does it take issue with the decision of the court of appeals insofar as

it affirms the district court. What is of concern to the Association is the complete denial of access to the rights assured by the APA implicit in the argument asserted by the Secretary in this Court.

We respectfully submit that this case can and should be decided under the APA, a statute that permits the introduction of hearsay evidence in appropriate cases through procedures which can be harmonized with the right of cross-examination.

I.

THE ADMINISTRATIVE PROCEDURE ACT APPLIES TO HEARINGS ON DISABILITY CLAIMS

The Administrative Procedure Act applies in "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing". (5 U.S.C.A. § 554(a)) Hearings on disability claims do not come under any of the six exceptions to this statutory requirement.

The Social Security Act provides an opportunity for hearing. Disability claimants dissatisfied with initial action on their claims by the Secretary are entitled by statute "to a hearing thereon by the Secretary to the same extent as is provided in section 405(b)" of Title 42. (42 U.S.C.A. § 421(d)). Section 405(b) provides that the Secretary, upon request, shall give a dissatisfied claimant

> "reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of the evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision."

In *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 50 (1950), this Court said: "We think that the limita-

tion to hearings 'required by statute' in § 5 [5 U.S.C.A. § 554(a)] of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion."

The determination of a disability claim, after hearing, is an adjudication within the meaning of the APA, inasmuch as it is an "agency process for the formulation of an order" (5 U.S.C.A. § 551(7)), an order reviewable by the courts under the APA. See *Cappadora* v. *Celebrezze,* 356 F.2d 1, 5 (2d Cir. 1966).

The adjudication in a disability case is determined on the record. The Secretary's action must be based on evidence under section 405(b). Under section 405 (g), relating to court review, the Secretary is required to file with the court "a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based." (42 U.S.C.A. § 405(g))

The provisions of sections 405(a) and (b) of the Social Security Act, upon which the Secretary relies as a source of his power to regulate these administrative proceedings, were enacted into law as part of the Social Security Act Amendments of 1939. (See 53 Stat. 1368-1369) These provisions and the administrative procedures which had been adopted pursuant thereto by what was then called the Social Security Board,[1] were considered by the Attorney General's

[1] Under the 1946 Reorg. Plan No. 2, and Act of August 28, 1950, the functions of the Social Security Board were transferred to the Federal Security Administrator. (See U.S. Code Cong. Service 1946, 1667, 1669, 64 Stat. 477, 559) The functions of the Administrator were transferred to the Secretary of the Department of Health, Education and Welfare by 1953 Reorg. Plan No. 1. (67 Stat. 631, 632)

Committee on Administrative Procedure in recommending legislation to Congress in 1941.[2] After a study of the Board's procedures, the Committee's Staff had advised the Committee:

> "* * * Under the 1939 amendments to the act, effective January 1, 1940, the grant of a hearing is no longer optional with the Board; the Board is now required, upon request, to give opportunity for a hearing to any person whose application for benefits has been disallowed. * * *
>
> Even though no hearings have yet been held, it is nevertheless possible to study this aspect of the Board's work in anticipatory detail, because the Board has approved very elaborate plans and has formulated regulations to govern the formal hearing and review process. * * *"[3]

When making specific recommendations as to how the administrative process might be improved upon by appropriate legislation, the Attorney General's Committee assessed its recommendations in the light of the responsibilities and practices of existing federal agencies. Speaking of the Social Security Board, the Committee remarked that the "recommendations in Chapter IV relating to hearing commissioners are applicable to and largely declaratory of the existing hearing proceedings before referees [of the Board]."[4]

Congress relied upon the studies of the Attorney General's Committee in drafting the legislation which

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[2] Final Report of the Attorney General's Committee on Administative Procedure, S. Doc. 8, 77th Cong., 1st Sess. (1941).

[3] Administrative Procedure in Government Agencies, Social Security Board, S. Doc. No. 10, part 3, 77th Cong., 1st Sess., 14 (1941). Professor Walter Gellhorn was director of the Staff.

[4] Final Report of the Attorney General's Committee on Administrative Procedure 157.

in 1946 became the APA. This is plain from the Reports of the Congressional Committees and the legislative debates.

> "In the framing of the bill herewith reported, (S. 7), your committee has had the benefit of the factual studies and analyses prepared by the Attorney General's Committee."[5]

In the course of debates in the United States Senate on S. 7, Senator McCarran, Chairman of the Senate Judiciary Committee and sponsor of the bill observed:

> "I would say that the bill takes into consideration those studies [of the Attorney General's Committee] and is guided by them."[6]

We submit that a careful reading will show that there is no actual conflict between the provisions of 42 U.S.C.A. §§ 405(a) and (b) enacted in 1939, on the one hand, and the relevant provisions of the APA enacted in 1946[7] on the other. But if there were any conflict, rules of statutory construction would require that the earlier statute give way to the later. *Gibson* v. *United States,* 194 U.S. 182, 192 (1904).

The remedial nature of the APA gives further warrant to our claim that it must be given preference. It "would be a disservice to our form of government and to the administrative process itself if the courts should

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[5] Administrative Procedure Act, Report of the Committee on the Judiciary, United States Senate, on S. 7, a bill to improve the administration of justice by prescribing fair administrative procedure, S. Rep. No. 752, 79th Cong., 1st Sess., 4 (1945).

[6] 92 Cong. Rec. 2155, March 12, 1946.

[7] 60 Stat. 237.

fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear." *Wong Yang Sung* v. *McGrath,* 339 U.S. at 41. If the Secretary's regulations are contrary to the plain provisions of the APA, the regulations must give way. See *Miller* v. *United States,* 294 U.S. 435, 440 (1935).

II.

CONGRESS INTENDED BY ENACTMENT OF THE APA TO PERMIT CONSIDERATION OF HEARSAY EVIDENCE WHILE PRESERVING THE RIGHT OF CROSS-EXAMINATION

As previously indicated, the American Bar Association takes no position on the merits of the claim of Mr. Perales. But we think it might be helpful to the Court, in its consideration of the issues herein within the context of the Administrative Procedure Act, to consider the following notes from that statute's legislative history.

Where administrative adjudication comes within the purview of section 5 of the APA, 5 U.S.C.A. § 554, and the controversy cannot be determined by consent, the Act provides that the agency must give all interested parties opportunity for "hearing and decision on notice and in accordance with" sections 7 and 8 of the APA (now 5 U.S.C.A. §§ 556 and 557). Subsection 7(d) of the APA provides in relevant part:

> "* * * Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. * * * A party is entitled * * * to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * *" (5 U.S.C.A. § 556(d)).

A. Congress Intended That Hearsay Evidence May Be Admitted Into Evidence

The Senate Judiciary Committee, reporting on S. 7 which became the APA, asserted:

> "* * * Thus while the exclusionary 'rules of evidence' do not apply except as the agency may as a matter of good practice simplify the hearing and record by excluding obviously improper or unnecessary evidence, the standards and principles of probity and reliability of evidence must be the same as those prevailing in courts of law or equity in nonadministrative cases. There are no real rules of probity and reliability even in courts of law, but there are certain standards and principles—usually applied tacitly and resting mainly upon common sense—which people engaged in the conduct of responsible affairs instinctively understand and act upon. They may vary with the circumstances and kind of case, but they exist and must be rationally applied. These principles, under this subsection, are to govern in administrative proceedings."[8]

During the Senate debates on S. 7, Senator McCarran discussed the admissibility of evidence under the proposed statute in these terms:

> "* * * So we said to [the agencies], 'You may go outside and get what would be secondary evidence, or hearsay; you may perhaps even go into the realm of conjecture; but when you write your decision it must be based upon probative evidence and nothing else. If in the formation of your decision you consider other than probative evi-

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[8] S. Rep. No. 752, *supra*, 22 (1945). Similar language may be found in the Report of the House Committee on the Judiciary on S. 7. See H. Rep. No. 1980, 79th Cong., 2d Sess., 36 (1946). See also Davis, *Administrative Law Treatise* § 14.05 (1958).

dence, your decision will be subject to being set aside by a court of review.'

In other words, we did not wish to destroy the administrative agencies or prescribe the methods under which they have been operating. * * * I doubt very much if any hearing is ever conducted in which, to some extent, hearsay is not admitted. But we believed, and we now believe, that reasonable men can sift the grain from the chaff. Then we laid down the rule that the administrative agencies must not make a finding which impinges upon an individual unless there is behind such finding probative evidence to sustain it. That is what we have worked out in this bill. * * * "[9]

B. The Right of Cross-Examination Is Protected by the APA

Turning now to the right of cross-examination guaranteed by subsection 7(d) of the APA, 5 U.S.C.A. §556(d), the Senate Judiciary Committee asserted:

> "The right of cross-examination extends, in a proper case, to written evidence submitted pursuant to the last sentence of the subsection as well as to cases in which oral or documentary evidence is received in open hearing. * * * To the extent that cross-examination is necessary to bring out the truth, the party should have it. * * * "[10]

The House Judiciary Committee expressed similar views:

> "The provision on its face does not confer a right of so-called 'unlimited' cross-examination. Presiding officers will have to make the necessary initial determination whether the cross-examina-

[9] 92 Cong. Rec. 2157, March 12, 1946.

[10] S. Rep. No. 752, *supra*, 22-23.

tion is pressed to unreasonable lengths by a party or whether it is required for the 'full and true disclosure of the facts' stated in the provision. Nor is it the intention to eliminate the authority of agencies to confer sound discretion upon presiding officers in the matter of its extent. The test is—as the section states—whether it is required 'for a full and true disclosure of the facts.' * * * The right of cross-examination extends, in a proper case, to written evidence submitted pursuant to the last sentence of the section as well as to cases in which oral or documentary evidence is received in open hearing. * * * To the extent that cross-examination is necessary to bring out the truth, the party must have it. * * *"[11]

CONCLUSION

The Administrative Procedure Act applies to social security cases. It permits consideration of hearsay evidence while preserving the right of cross-examination. The case before this Court can and should be decided through application of the Administrative Procedure Act.

Respectfully submitted,

AMERICAN BAR ASSOCIATION

By FRANKLIN M. SCHULTZ
Chairman, Administrative Law Section

JOHN T. MILLER, JR.

Its Attorneys

August, 1970

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[11] H. Rep. No. 1980, *supra*, 37.

APPENDIX A

Statutes Involved

1. The Social Security Act, as amended, 42 U.S.C.A. §§ 401, *et seq.*, provides in pertinent part:

§ 405(b) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. * * * In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

* * *

§ 405(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business

within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review

in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

• • •

§ 421(a) In the case of any individual, the determination of whether or not he is under a disability (as defined in section 416(i) or 423(d) of this title) and of the day such disability began, and the determination of the day on which such disability ceases, shall, except as provided in subsection (g) of this section, be made by a State agency pursuant to an agreement entered into under subsection (b) of this section. Except as provided in subsections (c) and (d) of this section, any such determination shall be the determination of the Secretary for purposes of this subchapter.

• • •

§ 421(d) Any individual dissatisfied with any determination under subsection (a), (c), or (g) of this section shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title with respect to decisions of the Secretary, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

2. The Administrative Procedure Act, as amended, 5 U.S.C.A. §§ 551, *et seq.*, provides in pertinent part:

§ 554(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

• • •

§ 556(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.